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the party, if guilty under the law of this state, would be subjected to punishment: Townshend on Slander 230.

Judgment below reversed and cause remanded, with directions to overrule the demurrer, and for further proceedings.

Supreme Court of Oregon.

THOMAS DUCKER v. THE STATE.

One who is paid by mistake money to which he is not entitled, and who upon discovering his mistake fraudulently converts the money to his own use, is guilty of larceny.

A. by mistake paid to B. a roll of twenty-dollar gold pieces, supposing it to be a roll of half dollars. B. subsequently discovered the mistake, and knew, or had the means of knowing, who was the owner, but nevertheless appropriated the money to his own use and refused on demand to make restitution. *Held*, that he was guilty of larceny.

Where, on the trial, the court is requested to give the jury certain instructions, and the bill of exceptions is silent on the subject, it is presumed that they have been given.

APPELLANT was tried and convicted upon an indictment charging him with the larceny of ten twenty-dollar gold pieces, the property of Theodore Bracker.

The testimony introduced at the trial, on behalf of the state, tended to show as follows: That the defendant went into the place of business of Bracker, in the city of Astoria, where the defendant was well known and acquainted and where he had often been before and on like business, and asked Theodore Bracker to change a gold coin for him. That in giving defendant his change Bracker gave him, by mistake, a roll of coin for a ten-dollar roll of silver, that was a roll of ten twenty-dollar pieces, thereby giving him by mistake the sum of \$190 too much. That said roll of gold twenty-dollar pieces was rolled up and enclosed in paper and closely resembled a ten-dollar roll of silver. The defendant took the roll and without unrolling or examining it placed it in his pocket and after talking a few moments went on his way.

That Bracker, upon discovering the loss of the gold coin, recollected that he had changed money only with the defendant and Judge Elliott, and afterwards was informed by Elliott that his (Elliott's) change was all right; that he did not speak to defendant about it sooner for the reason that he believed that if defendant was honest he would return the money, and if he was not honest he would deny having it and get the money out of the way, and Bracker

would lose it; that afterwards a man was in his (Bracker's) store and was speaking about a mistake that had been made in Astoria in changing money, and that Bracker then met the defendant and said to him, "Didn't you get the better of me nearly \$200 in change some time ago?" Defendant said, "How's that?" Bracker answered, "Why, I gave you a roll of gold coin instead of silver, and you got at least \$190 too much." Defendant answered, "Yes, that's so, and I am sorry for it, for I have squandered the money; but I will give you my property." Bracker said nothing more at the time, but soon after met the defendant and asked him to give him his note for the amount. Defendant answered, "No, I won't do it. You think you have got me in a corner. I didn't get any of your money, and I won't do anything of the kind."

The state also introduced evidence tending to show that the same evening or the next day, or at any rate very soon after getting the change, the defendant showed one Livingston about \$200 in twenty-dollar gold pieces, and told him that some one, either Parker or Theodore (meaning Theodore Bracker), had given him that by mistake for silver, and that if it was Theodore he was going to give it back to him.

The defendant introduced no testimony, but by his counsel, moved for his discharge on the ground that there was no evidence of a felonious taking.

The defendant, being convicted, appealed to this court.

The opinion of the court was delivered by

PRIM, J.—The indictment charges the appellant with the larceny of ten twenty-dollar gold pieces. At the trial the court, among other things, charged the jury that "if the prosecuting witness returned to the defendant ten twenty-dollar gold pieces under the belief that he was giving him that number of silver pieces, and the defendant so took them, sharing the mistake, and if upon discovering the mistake the defendant knew, or had the means of knowing, who the owner of the gold pieces was, but he therefore, nevertheless, converted them to his own use, it was larceny."

This instruction is objected to on behalf of the appellant and assigned as error. This objection, we think, is not well taken, as the instruction contains a correct statement of the law upon the point developed by the evidence in this case. The money in excess of that which the appellant was entitled to receive, was taken without the owner's consent, and that which was thus taken

was appropriated to the appellant's use with an intent to cheat and fraudulently to deprive the owner thereof.

These two elements being both present in this case are sufficient to constitute the crime of larceny, for it will not do to say that the owner parted with his money voluntarily; and therefore there could not have been any unlawful taking. While it may be said it was the physical act of the owner in handing that which was his to another, yet it was lacking his intellectual and intelligent assent to the transfer upon which the consent necessarily depended. And so in a case "where money and property is obtained from the owner by another, upon some false pretence for the temporary use only, with the intent to feloniously appropriate it permanently, the taking thereof, though with the owner's consent, is larceny:" *Wolfstein v. Joseph*, 13 N. Y. 121; *People v. McGanness*, 17 Id. 630; *People v. Call*, 1 Id. 120.

It is further claimed by counsel for appellant that the court was asked to charge on his behalf, as follows:

1. That unless the jury believed from the evidence that defendant intended to convert the money so received by mistake, as soon as he discovered this mistake, the subsequent conversion was not larceny.

2. That if at any time after defendant discovered the mistake, and before conversion, defendant honestly intended to return the money to Bracker (if Bracker was the person he received it of), then any subsequent conversion would not constitute larceny.

3. That the *animus furandi* must have existed as soon as defendant discovered the mistake, in order to constitute larceny.

It is claimed that these instructions were refused, and that the court erred in so refusing. The bill of exceptions being silent upon this matter, it must be presumed that they were given. The bill of exceptions says the instructions first complained of, and heretofore referred to in this opinion, among others were given without specifying what they were.

There being no substantial error in the record, the judgment is affirmed.
